IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGICAL CIVIL JURISDICTION.

WRIT PETITION NO. 821 OF 2003

Mumbai Mazdoor Sangh)
32/33, Ibrahim Mansion,)
Dr. Ambedkar Marg,)
Parel, Mumbai 400 012.) ..... Petitioners.

versus

Air India Limited)
Through the Managing)
Director, Air India Ltd.,)
Air India Building,)
Nariman Point,)
Mumbai 400 021) ..... Respondents.

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Mr. S.M.Dharap with Mr. Neel Halekar for the Petitioners.
Mr. S.K. Talsania i/b M.V.Kini & Co. for the Respondents.

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CORAM ; F.I. REBELLO, J.

DATED; 14TH DECEMBER, 2004.

ORAL JUDGMENT;

1. The petitioners sought a reference in respect of persons who were employed with the respondent between the years 1987 to 1993. The demand of the petitioner union itself was made in the year 1998 and thereafter the reference came to be made by the appropriate Government. The reference as made, read as under:

" Whether the action of the employer of M/s. Air India Limited, is not regularizing the services of 959 casual labourers (as per list attached) is legal and justified ? If not, to what relief are there workmen entitled ?"

2. A claim statement came to be filed on behalf of 959 employees, whose names were listed in the schedule. The contentions of the petitioner union was that these workers were engaged in the categories of loaders, cleaners, sweepers, peons and other employees in different categories of Airport (operation area) and at such other places of work as required at Mumbai Airport. The workers used to be engaged groupwise and location basis though the work was not on permanent basis. These appointments were of 110 days in a year. There is no security of employment and as such the position of these employees is that of suspended animation and as a result they could not go for employment in other places. Though they worked in 1987 and thereafter they are not given preference for regularisation based on their seniority and the management continues to appoint employees on casual and temporary basis and therefore denied the right to work which is unfair and arbitrary and violative of their right to life.

3. The respondent management resisted the claim by contending that the workers under reference worked only for a fixed period of 110 days and that too, 5 to 10 years before the reference. It was set out that therefore there is no vested right existing or otherwise created in favour of workers to claim employment. It was next contended that the respondent being Government of India undertaking is required to follow prescribed recruitment policy, which prescribe minimum and maximum age for various posts, minimum qualifications etc. along with various directives for reservation for Scheduled Caste and Scheduled Tribe and other backward candidates. The respondent contended that as per rules, the company is required to notify vacancies if any to the local employment exchange and fill up vacancies from the eligible candidates sponsored through employment exchange. In the result, if the relief is granted as sought by the workmen, it will amount to giving a go by to the Rules and Regulations and allowing back door entry. It is next submitted that the respondent has in its employment 17980 employees out of which 11523 are ground category consisting of technical and non technical, clerical and allied category as well as loaders cleaners, peons etc. Out of this 11523 employees, 1492 are loaders, 1475 are

cleaners, 229 are handymen safai, 263 are peons and 1011 are in clerical categories. Besides 556 are safai kamgars and 159 Suraksha Rakshak Kamgars. The respondent thus contended that they are over burdened with excessive staff and workmen. The regularisation of these labourers would result in huge additional financial burden for no reason and for want of funds, the company cannot do that. It is also set out that the respondent had employed casual labourers for short duration for reasons which are legal and justified. The respondent being national carrier is required to handle various other carriers and the contract for handling their operations are entered into and renewed with these national carriers and other carrier on year to year basis. These contracts are purely temporary in nature and not permanent. The work undertaken to be performed under these contracts is also of a casual and temporary nature.

It is also set out that about 25% of regular/permanent employees stay away from work without permission and the nature of Air Line Industries is such that if the company does not engage casual workers to fill in gaps, the entire work will get paralysed. It is on account of this, that the casual workers are to be engaged. It is therefore pointed out that the company cannot engage

workers on permanent basis. At times, the company is also required to handle special charters for transportation of perishable and precious articles for which it requires casual workers. It is also required to handle special assignments like non-aligned meetings, commonwealth heads of Government meetings, Asian Games, International Sports Meetings, International Political Conference etc. The copany is also required to handle special Haj charters for transporting the pilgrims. It is also pointed out that some casual labourers had moved the High Court/Supreme Court and Industrial Tribunals seeking regularisation of their services. Consequent thereto some labourers were required to be regularised. Appointment has also to be done on the basis of physical disability, compassionate ground etc. Consequently, there are no vacancies and as such it is not possible for respondents to entertain the claim of the employees.

4. Various contentions were raised on behalf of the parties at the time of hearing before the learned Industrial Tribunal. It was contended that the workers under reference cannot be said to be workmen nor the dispute raised could be said to be an industrial dispute as it did not have the support of a substantial number of regular workmen employed in the undertaking,

nor did the petitioner union have substantial membership of regular employees working in the respondent undertaking. The direct workmen, it was submited, of the company are not at all interested because all the workers under reference were engaged for short period, during the period from 1987-93 and that they did not raise any demand. On consideration of the said contention, the learned Tribunal held in favour of the respondent company that the dispute as raised would not constitute an industrial dispute. The learned Tribunal thereafter proceeded on the merits of the issue considering the terms of the reference. After considering the rival contentions and the evidence, which was recorded, the learned Tribunal held that it was not possible to grant relief and consequently the demand to regularise the workers under reference was unsustainable. The contention on behalf of the petitioners-union that substantial work was available, was negated. The learned tribunal recorded a finding that on the evidence on record, it was apparent that the work is not perennial. The learned trubunal also held, considering the law laid down by the Apex court that the workmen in respect of whom the regularisation was sought had not worked for a substantially long period. The tribunal also held that pursuant to various awards and orders of High Court and

Supreme Court the respondent company had to engage and/or regularise some labourers. The Minitry of Civil Aviation by memorandum dated 23/6/1997 had also imposed a total ban on recruitment. The respondent company had to follow that. Apart from that the respondent company had to follow the reservation policy in the matter of recruitment. The learned tribunal also recorded a finding that it found substance in the contention of the management that the company is already overstaffed and suffering financial loss. In such circumstances regularisation of workers under reference would lead to drastic and disastrous consequences. The learned tribunal considered the factual aspect that the demand of workers is not reasonable. The reference made to an earlier award wherein relief of absorbtion was granted was considered and differentiated. Accordingly the reference was negated.

5. On behalf of the petitioner, their learned counsel submits that appointing persons for short period when there is work of regular nature amounts to an act of unfair labour practice. It is submitted that atleast the respondent company ought to have maintained a pool from which the employees ought to be reappointed as and when jobs become available. It is submitted that reliance placed by the tribunal in the judgment in the

case of **Gujarat Electricity Board, Ukai, Gujarat Vs. Hind Mazdoor Sabha reported in 1995 (71) F.L.R. 102** was totally misplaced, considering what the learned Apex court was considering in Gujarat Electricity Board's case (supra), was the issue of regularisation of contract workers who were engaged in the respondent company. Similarly it is pointed out that the tribunal ought not to have been relied on the judgment in **Indian Oxygen Ltd. Vs. The workman Employed by them reported in 1979 L.I.C. 585 as it is distingishable.** The learned counsel further contended that in the instant case there was no delay and on that count the reference ought not to have been rejected.

On the other hand on behalf of the respondent, their learned counsel has submitted as under:

a. That the reference sought is not in respect of workmen within the meaning of section 2(s) of the Industrial Dispute Act. The persons whose names are listed in annexure to the reference, were employed as casual labourers for short period.

b. The reference is only in respect of regularisation. Admittedly the services of

the persons listed in the annexure were terminated on various dates between the years 1987 to 1993. None of them were at the time of reference in the employment of company. No reference in respect of re-instatment has been made and on this ground also the relief as prayed for in the reference could not have been granted.

c. The court, it is contended, must consider that reference is in respect of persons whose service was terminated between the year 1987-93 and most of them hardly worked for 110 days in a year but the demand was made only in the year 1998. There is therefore gross delay.

d. It is then submitted that there was no industrial dispute within the meaning of section 2(k) of the I.D.Act as no regular employees have supported or espoused the cause of the workmen. The union espousing the cause has no membership of regular workmen in the establishment. There is admission to that effect. Apart from that, these workmen listed became their members of

the union in the year 1997. It therefore submitted that the dispute would not partake of an Industrial dispute, within the meaning of section 2(k) of the Industrial Dispute Act.

e. It is also submitted that there is a ban of new recruitment since the year 1997. That being the case it is not open for the court to issue directions for recruitment, considering the direction of the Government of India which were binding on the respondent company, which is an undertaking of the Government of India.

f. It is also submitted that even if for the purpose of regularisation, the persons concerned, must meet the eligibility criteria. The workers did not possess the same. Even otherwise the court should not regularise their employment as the appointment of casual employees was not by following the rules for recruitment. Regulation would amount to back door entry

g. It is lastly submitted that the

respondent company has been justifiable reasons for casual employment. The learned tribunal has found force in the reasons given and it cannot be said that the reasons are perverse and as such this court ought not to exercise its extra ordinary jurisdiction under Article 226 and 227 of the Constitution of India.

6. Having heard the learned counsel, the question really is whether the award is liable to be interfered with. We may first consider the contention raised on behalf of the respondent management that the dispute as raised would not be an industrial dispute within the meaning of section 2(k) of the Industrial Dispute Act of 1947. To constitute an industrial dispute it has to be a dispute or difference between an employer and employers or between the employer and workmen or between the workmen and workmen. The law is now settled that to constitute an industrial dispute the dispute must be sponsored or supported by a substantial number of workmen employed in the undertaking and or establishment or that the union espousing the cause must be a registered union representing workmen in the establishment. In the instant case the evidence of J.P.Singh, Secretary, Mumbai Mazdoor Sangh was

recorded. From his cross examination it has come on record that permanent employees of Air India are not their members. It is further in evidence that the direct employees of Air India have no concern whether the workmen involved in the reference are regularised or not. He then deposes that the workmen became members of the union in 1997. In his evidence he also stated that from the 959 employees only about 36 workmen worked in the company after 1993. On further cross examination he was not in a position to produce any documentary evidence that those 36 workers had worked after 1993. He also admitted the demand of regularisation of the workmen was made in 1997 for the first time. It is his further evidence that the demand for regularisationn was made because they had worked for minimum 110 days at some point of time. Considering this evidence it would be clear that the regular workmen in the company have not espoused the cause of the 959 employees whose names are listed in the annexure to the reference. It is further clear that the petitioner union has no membership in the undertaking amongst the regular employees. They had membership for the first time only in the year 1997 of the employees whose names are listed in the annexure. From the evidence it will be clear that the workmen listed had worked between the years 1987-93 for a short

period and at the time when they joined the union in the year 1997, they were not in employment and had ceased to be an employee at least for a period ranging from 10 years to 4 years. Admittedly the 17980 employees did not support the cause of these 959 workmen, nor their union. Considering the law laid down by the Apex court it is clear that the dispute raised does not partake the character of an industrial dispute. It would be celar that this would not be a dispute between the employer i.e. the company and workmen as understood by the Act and as per the law as declared. The learned tribunal was right in upholding the contention raised on behalf of the respondent company that this was not a industrial dispute within the meaning of section 2(k) of the Act. The reference on that point itself is to be rejected.

7. The next submission to be considered is whether the workmen are entitled to be regularised more so as the reference was made after gross delay. It is true that the delay by itself would not be a ground to deny the relief considering that appropriate authority itself thought it fit to refer the matter. The question really is whether on the material on record it would be open to an Industrial tribunal considering the period of employment to grant the relief of regularisation of

a demand made for the first time in the year 1997 and in respect of persons who were no longer in service at least for a period ranging from four years to 10 years at the time of the references. For the purposes of considering the relief it must also be borne in mind that none of the workmen were in the service when the demand was raised. There is evidence on record to show that most of them had worked only once for a period of 110 days between the years 1987-93. It is possible a miniscule may have worked more than once. While considering the issue of regularisation apart from delay in seeking reference, the position of the company including whether it is in a position to absorb the workmen when the demand was made has to be considered. When the demand was made there was a ban by the Government of India in making regular appointment. Material has also come on record that respondent company was overstaffed. The Tribunal has considered all aspects while rejecting the reference. In that context, the objection raised by the respondent company that the reference was delayed was a relevant consideration. The order of the Tribunal does not suffer from any error apparent on the face of the record.

8. On behalf of the respondent, their learned counsel

has drawn my attention to the judgment of the Apex court in the case of **A Umarani Vs. Registrar. Co-operative societies and others, (2004) 7 S.C.C. page 112.** The Apex court after considering the law has summarised the same in paragraphs 39 to 70. Some of the tests as laid down which must be borne in mind in respect of a company which is a State within the meaning of Article 12 are as under:

a) Regularisation cannot be mode of recruitment by any 'State' within the meaning of Article 12. It is a settled proposition that the appointment made in violation of the mandatory provision of the statue and in particular ignoring the minimum educational qualification and other qualifications would be wholly illegal and such illegality cannot be cured by taking recourse of regularisation.

b) Those who come by back door should go through that door.

c) Regularisation further cannot be given to the employees whose services are ad-hoc in nature.

d) No regularisaion is permissible in exercise of the Statutory power conferred under Article 12 of the Constitution of India when the appointments are in contravention of the statutory rules.

e) It is trite that appointments cannot be made on political considerations and in violation of the Government directions for reduction of establishment expenditure or filling up of vacant posts or creating new posts including regularisation of daily wage employees.

f) There is no scope for regularisation unless the appointments were made on a regular basis.

g) If the employees are appointed for the purpose of a scheme, they do not acquire vested right of continuance after the project is over.

These are some of the situations that can be called out from the judgment of the Apex court (supra).

Considering the above tests, in the instant case the factual matrix is as under:

1) Most of the workmen whose names are listed were appointed once for 110 days between the years 1987 to 1993.

2) The respondent no.1 has given reasons as to why they have to make casual employment. In my opinion it cannot be said that the reasons are not justifiable.

3) The appointments which are casual were never made following the recruitment rules or by exercising any criteria of the Government directives in the matter of reservation for Scheduled Caste and Scheduled Tribe etc.

The respondent company has produced material on record and substantiated the same to show that they are heavily over staffed and it is not possible for them to regularise any more employees. The respondent company has further brought on record the material to show that they were suffering huge loss and heavy financial burden would be imposed on them if they are

called upon to regularise the workmen as that would result in financial loss and disruption of the entire employment. These are some of the reasons which were given. In my opinion, these are just and sufficient reason to justify as to why the industrial tribunal in the reference made could not have allowed the reference. The learned tribunal after considering the material, has examined all the aspects and thereaftrer has come to the conclusion that the reference made cannot be allowed in favour of the workmen. In my opinion such finding cannot be said to be perverse. The award of the Industrial tribunal therefore need not be interfered with. Having said so, it is really not necessary to consider the other arguments advanced.

9. Another contention that the management ought to create a pool of casual employees and draw from that pool as and when casual employment arises, to my mind would be directly interfering with the managerial right to organise their business apart from being not a term of the reference. The management must have flexibility to run its business and to engage casual labourers, depending on the circumstances. Courts should not interfere with normal nmanagerial exercise unless it amounts to an unfair labour practice or otherwise barred by law or the like. It is not possible to

accept that casual employees will wait for months or years together to be called upon to join work for an intermittant period. That argument must be rejected.

10. Hence Rule discharged.

There shall be no order as to costs.

Certified copy expedited.

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